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No. 91-453

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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DAVID H. LUCAS,

*Petitioner*,

v.

SOUTH CAROLINA COASTAL COUNCIL,

*Respondent.*

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**On Writ of Certiorari to the Supreme Court of the State of South Carolina**

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## BRIEF AMICUS CURIAE OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF RESPONDENT

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## BRIEF AMICUS CURIAE OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF RESPONDENT

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### INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, we file this brief as amicus curiae in support of respondent South Carolina Coastal Council. Letters of consent from counsel for the parties have been filed with the Clerk.

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a private charitable and educational

organization to further the historic preservation policy of the United States and to "facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest." 16 U.S.C. §§ 461, 468 (1988). Congress intended that the National Trust "will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. The National Trust has more than 250,000 individual members, including over 4,000 members who reside in the State of South Carolina, as well as some 6,600 member organizations nationwide.

The National Trust has a vital interest in securing judicial decisions that ensure the continued validity and effectiveness of regulatory protections for historic properties and regulations that otherwise serve to protect the character of America's cities, towns, and countrysides. To this end, the National Trust, through its Legal Defense Fund, maintains an active legal advocacy program to ensure the effective application of federal, state, and local laws that protect historic resources, and to uphold the constitutionality of such laws under both the U.S. Constitution and the constitutions of the various states. Since 1970, the National Trust has participated in nearly 70 cases in federal and state courts, including seven cases before this Court involving challenges to governmental regulatory authority under the Takings Clause of the Fifth Amendment.*

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* *Yee v. City of Escondido*, No. 90-1947 (argued Jan. 22, 1992); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).



## STATEMENT

In 1977, the South Carolina legislature enacted the Coastal Zone Act ("CZA"), 1977 Act No. 123 (codified at S.C. Code Ann. § 48-39-10 *et seq.* (1987) (Pet. App. 42-97)), which prohibited any new development in critical areas of the coastal zone, at that time defined as including coastal waters, tidelands, beaches, and primary ocean front sand dunes. *Id.* § 48-39-10(J) (Pet. App. 45). The CZA prohibited development in the area beyond the "front row of dunes adjacent to the Atlantic Ocean." *Id.* § 48-39-10(J) (Pet. App. 45).[1] In 1986, petitioner, a developer with extensive experience with coastal properties, purchased two beachfront lots that were zoned for construction of single family homes.

In 1988, South Carolina enacted the Beachfront Management Act (the "BMA"), in part to prevent erosion of coastal areas found to be necessary to "protect[] life and property by serving as a storm barrier." Beachfront Management Act, 1988 Act No. 634 § 4 (codified at S.C. Code Ann. § 48-39-250(1)(a) (Pet. App. 98)). To accomplish this goal, the BMA enlarged the critical area defined by the CZA to a setback line to be established "utilizing the best available scientific and historical data." *Id.* § 48-39-280(A) (Pet. App. 110). The South Carolina

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[1] The CZA was enacted pursuant to the requirements of the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988) ("CZMA"), thereby allowing residents of South Carolina to enjoy the benefits of federal grants and flood insurance. One of the primary national policies of the federal CZMA is "the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas . . . and by the destruction of natural features such as beaches, dunes, wetlands, and barrier islands." *Id.* § 1452(2)(b). To accomplish this and other goals, the CZMA requires participating states to implement programs for protection of coastal resources which, among other things, define "what shall constitute permissible land uses . . . within the coastal zone." *Id.* § 1454(b)(2).

Coastal Council ("SCCC"), the state agency charged with implementing and enforcing the BMA, established a new setback line along the coast that was behind the landward border of petitioner's property, thereby prohibiting any new construction on petitioner's property. Petitioner filed suit in the South Carolina Court of Common Pleas seeking compensation under the Fifth and Fourteenth amendments to the U.S. Constitution (and corresponding state constitutional provisions) equal to the value of his property, which he claimed had been "taken" by the BMA.[2] The South Carolina Supreme Court held that no taking had occurred.

## SUMMARY OF ARGUMENT

In 1986, petitioner purchased two lots on a barrier island on the South Carolina coast. The "land" comprising petitioner's lots has been entirely under water at times within the last 40 years. In 1988, the South Carolina legislature, finding that the coastal beach/dune system "protects life and property" and that construction "has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property and development in coastal areas," enacted the Beachfront Management Act, which prohibited future coastal development seaward of setback lines to be established, "utilizing the best available scientific and historical data," landward of recent high water marks. The setback line thereafter established is landward of petitioner's lots.

Petitioner concedes "the public wisdom of the South Carolina Act" (Br. 10) and does not challenge the wisdom of placing the setback line landward of his property. His *only* contention is that since the BMA deprives his

[2] In 1990, South Carolina enacted amendments to the BMA authorizing the SCCC to issue a "special permit" to build structures otherwise prohibited if certain criteria are met. S.C. Code Ann. § 48-39-290(D) (Pet. App. 125-26). Petitioner has not sought such a permit under the 1990 amendments.



property of all economic use, it effects a compensable taking, regardless of the nature, validity, or strength of the interest served by the BMA.[3]

I. This Court first held more than a century ago in *Mugler v. Kansas*, 123 U.S. 623 (1887), that a state may, without paying compensation, prohibit uses of property that cause serious harm to persons or other property. The principle that ownership of property does not include the right to use it in ways that harm others is of ancient vintage, is firmly established in the Court's takings cases, and has never been seriously questioned.

The uses of property that cause serious harm to others are not limited to a fixed and finite list. To the contrary, whether a use is harmful may depend upon current scientific knowledge and on the physical context of the property ("a nuisance may be merely a right thing in the wrong place,—like a pig in a parlor instead of the barnyard"). A use may *become* or *be discovered to be* harmful, and whether a use causes serious harm is often a subject for legislative determination. Previously acceptable uses of property may subsequently be determined to pose a threat of serious harm, as illustrated by

[3] As the Solicitor General has pointed out (U.S. Br. 9-12), petitioner's claim of a "permanent" taking cannot be maintained in light of the 1990 amendments to the BMA, authorizing construction with a special permit for which petitioner has not yet applied. At most, petitioner would have a claim for compensation for any damages incurred in the interval between adoption of the BMA and the 1990 amendment. Such a claim would present both legal and factual issues that the South Carolina courts have had no occasion to consider. These would include (i) whether petiitoner suffered any injury at all during a period for which he has not attempted to prove any plan for use, and (ii) whether the legislature could call a temporary halt to escalating development on protective beaches while it developed a permitting system, without imposing any form of taking even on a landowner ultimately held entitled to a permit. Rather than decide important constitutional issues in such an inappropriate context, the Court may prefer to allow petitioner the opportunity to apply for a permit and then pursue any remaining taking claim.

the Court's decisions in *Mugler*, *Hadacheck*, *Reinman*, and *Schoene*. And a use may be harmful, and subject to prohibition under the *Mugler* principle, if engaged in by a large number of property owners, even where a single instance of that use might not be seriously harmful.

The right of a state to bar uses of property that threaten serious harm to others, without paying compensation, is not limited to cases where there is some permissible economically viable use of the property. To the contrary, it is based on the principle that a property owner does not "own" the right to harm others. The *Mugler* Court expressly assumed that the regulated breweries might "become of no value as property," and none of the Court's several decisions based on the *Mugler* principle has suggested that an alternative economically viable use must be available.

II. The South Carolina legislature determined that additional construction in the restricted areas would jeopardize the beach/dune system that protects life and property. A court hearing a taking claim defended on *Mugler* grounds should determine whether the statute or regulation at issue substantially advances the goal of preventing serious harm to others. Here, based in part on petitioner's concession, the South Carolina Supreme Court found that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." This Court should affirm on the ground that the state court properly accepted petitioner's concession and then properly applied the *Mugler* principle.

Even if petitioner had not conceded the point, there was ample basis for the conclusion of the South Carolina legislature and the court below that barring further construction on the restricted property was necessary to prevent serious harm. Congress has recognized in the Coastal Zone Management Act that destruction of "beaches, dunes, wetlands, and barrier islands" causes



"loss of life and property." The coast in question is visited by storms—most recently, Hurricane Hugo—that take lives and cause devastating property losses. There is abundant scientific basis for the South Carolina legislature's conclusion (with which other coastal states agree) that barrier beaches, dunes, and islands, all important buffers against such storms, cannot be preserved by artificial barriers and are weakened and destroyed by new construction.

Petitioner does not contend that it was inappropriate to draw the setback line landward of his property, which has been under water within recent memory. Certain amici point out that other landowners were allowed to develop property prior to the imposition of the setback line. But the legislature had the authority, when it learned that traditional erosion control devices were counterproductive, to bar further construction without requiring demolition of existing structures.

III. Certain amici suggest that *any* restriction on the use of property, unless justified by the need to prevent serious harm to others, is a taking, regardless of the extent of the deprivation of use in question. This suggestion is irrelevant to this case, which does involve serious public harm and a denial of all economic use of petitioner's property. But the suggestion is also seriously wrong. The Court has repeatedly recognized that otherwise valid regulation may substantially reduce the value of property, and it has *never* found a regulatory taking where economically viable uses of the property remain.

## ARGUMENT

Petitioner's only argument is that *every* regulation that denies a property owner "economically viable use" of his property effects a taking. (Br. 19.) We show in Part I that a regulation barring uses of property that threaten serious harm to others does not effect a taking, even if the prohibited uses are the only economically viable uses of the property. We show in Part II that the South Carolina Supreme Court properly accepted the findings of the state legislature that the building of additional structures on certain Atlantic beachfront property threatened serious harm to persons and other property. In Part III, we show, in response to the arguments of certain amici on an issue not presented in this case, that an otherwise proper regulation that does *not* eliminate all economically viable use of a parcel of property cannot be deemed to effect a taking.

### I. A REGULATION BARRING USES OF PROPERTY THAT THREATEN SERIOUS HARM TO OTHERS DOES NOT EFFECT A TAKING, EVEN IF THE PROHIBITED USES ARE THE ONLY ECONOMICALLY VIABLE USES OF THE PROPERTY

#### A. This Court Has Long Recognized That a State May Prohibit Uses of Property That Threaten Serious Harm to Others Without Paying Compensation

More than a century ago, this Court made it crystal clear that a state may, without paying compensation, prohibit uses of property injurious to public health, safety, or welfare:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property . . . . The power which the States have of prohibiting such use . . . is not—and, consistently with the existence and



> safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted . . . to inflict injury upon the community.

*Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887). On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the ordinance "operated to destroy the business of the company, and seriously to impair the value of its property." *Id.* at 668.[4]

Applying the *Mugler* principle, the Court has repeatedly sustained uncompensated prohibitions of harmful uses of property. *See Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (law prohibiting operation of livery stables in downtown area); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law prohibiting operation of brick yard and kiln in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (law requiring destruction of cedar trees because they harbored a disease harmful to apple trees); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (law restricting dredging and pit excavating in residen-

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[4] Petitioner and certain amici suggest that *Mugler* was decided under the Due Process Clause of the Fourteenth Amendment instead of the Takings Clause, and is therefore inapplicable here. *E.g.*, Br. 12-13; Brief Amicus Curiae of Pacific Legal Foundation 18-20. But the Court was explicitly responding to the contention that the ordinance "is, in effect, a taking of property for public use without compensation." *Mugler*, 123 U.S. at 664. Any suggestion that *Mugler* was overruled by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is meritless. The decision in *Pennsylvania Coal* turned on the fact that "the public interest is shown by the statute to be limited" and the statute was "not justified as a protection of personal safety." *Id.* at 414. Justice Holmes, who wrote for the Court in *Pennsylvania Coal*, plainly did not believe it had overruled *Mugler*, because he later joined the Court's opinion in *Miller v. Schoene*, 276 U.S. 272 (1928), upholding on the basis of *Mugler* the uncompensated destruction of cedar trees to prevent cedar rust from infecting more valuable apple trees nearby.

tial area).[5] Most recently, the Court sustained the power of a state to prevent owners of coal property from removing coal that supported surface structures, without paying compensation, on the ground that the regulation was designed to "prevent[] activities similar to public nuisances." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987).[6]

Even dissenters to the application of the *Mugler* principle in specific cases have acknowledged the overall validity of the principle. For example, Chief Justice Rehnquist observed in dissent in *Keystone* that government has "unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." 480 U.S. at 511. *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting) (recognizing the principle that "government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use"); *id.* at 145 ("the question is whether the forbidden use is dangerous to the safety, health, or welfare of others"); *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 906 (S.C. 1991) (Harwell, J., dissenting) (some "regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner").

The *Mugler* principle applies to uses of property that cause serious harm to others—uses that violate the

[5] *See also United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (law requiring closure of gold mine).

[6] The *Keystone* Court noted that state courts have consistently upheld laws banning "nuisance-like activities" without payment of compensation. *See* 480 U.S. at 492 n.22 (citing, *e.g.*, *Nassr v. Commonwealth*, 477 N.E.2d 987 (Mass. 1985) (hazardous waste operation); *MacLeod v. Takoma Park*, 263 A.2d 581 (Md. 1970) (unsafe building); *Eno v. Burlington*, 209 A.2d 499 (Vt. 1965) (fire and health hazard)).



maxim *sic utere tuo ut alienum non laedas* ("use your property so as not to injure another's"). But while the maxim is ancient, the class of harmful uses must obviously be defined contemporaneously by the property's physical context and by current scientific knowledge. This Court has explicitly recognized that the *Mugler* principle is not confined to common law "nuisances."[7] And the Court has expressly recognized, in Justice Sutherland's memorable words, that "a nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Use of land for a brickyard (*Hadacheck*), for a livery stable (*Reinman*), or to grow cedar trees (*Schoene*) is not inherently harmful, any more than building a house is inherently harmful. But in particular physical contexts, each of these uses, including building a house, may be harmful—a

[7] *See Miller v. Schoene*, 276 U.S. at 280 ("We need not weigh with nicety the question whether the infected cedars constitute a nuisance . . . ."); *accord Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962); *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915). The category of seriously harmful uses evolves over time and is obviously subject to legislative definition. For example, although air or water pollution that harms a neighbor has been deemed a nuisance for centuries, *see, e.g.*, *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1611) (enjoining and awarding damages for a nuisance created by odors from a hog sty); *Beach v. Sterling Iron & Zinc Co.*, 33 Atl. 286, 291-93 (1895) (enjoining as a nuisance the dumping of clay extracted from a mining operation into the river upstream of plaintiff's property), *aff'd*, 41 Atl. 1117 (N.J. 1896), greater understanding of the severity of the pollution threat has resulted in comprehensive, detailed federal statutes regulating its sources, such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988), the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988). The Court has recognized that these regulatory programs have both evolved from and displaced the historic theories of nuisance. *See City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (Federal Water Pollution Control Act displaced federal common law of nuisance).

substantial intrusion upon the safe and beneficial use and enjoyment of other property.[8]

It is equally clear that a particular use of property can *become* a harmful use (and, a fortiori, that a use can be discovered to be a harmful use) after the property is acquired by a particular owner. The brick kiln in *Hadacheck* became harmful when a residential neighborhood grew up around it. *See Hadacheck*, 239 U.S. at 405, 410-11. The owner of coal lands discovered to contain poisonous gases could surely be barred, without compensation, from mining that would release the gases. *Cf. Pennsylvania Coal*, 260 U.S. at 418 (Brandeis, J., dissenting). While such a landowner would have suffered a misfortune that might command public sympathy, the public would not be the *cause* of that misfortune, and an uncompensated prohibition against such mining, while undoubtedly a burden, would not be an "unfair" burden to impose.

Petitioner suggests that it is inherently "unfair" to bar a use of property that had hitherto been acceptable. But if changing circumstances or new scientific knowledge about the harm caused by a prohibited activity are the source of the new restriction, it is not "unfair" to modify the laws accordingly. Indeed, the *Mugler* Court itself recognized that a legislature may enact new prohibitions based on evolving knowledge and evolving perceptions of harm:

> It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the

[8] Some amici suggest that the right to build a house is so fundamental that its prevention, without more, gives rise to a claim for compensation. *E.g.*, Brief of Washington Legal Foundation, et al., as Amici Curiae 18-20. But there is no such doctrine. House construction is of course usually a non-harmful use, but there is no "inherent" right to build a house in an area where, because of unusual conditions, such construction threatens serious harm to life and other property.



> State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. . . . [T]he supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

*Mugler*, 123 U.S. at 669 (quoting *Stone v. Mississippi*, 101 U.S. 814 (1879)). *See also Keystone*, 480 U.S. at 488 ("circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern") (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

Finally, a legislature may prohibit, on the *Mugler* principle, a class of use that collectively threatens serious harm to the public, even though a single instance of such use might not be seriously harmful. If placement of a number of houses on an oceanfront bluff would be likely to cause erosion, loss of the bluff, and resulting damage to landward property, a state may surely prohibit all such houses, without paying compensation, even if building the first house alone would not cause serious harm. And if it were discovered *after* the building of the first house that building a number of additional houses would threaten serious damage, the legislature could call a halt at that point, again without paying compensation to the owners denied the right to do what their neighbors had done.[9] The prohibition would be sub-

[9] Certain amici object that the restricted landowner enjoys no "reciprocal advantage" if he is wholly barred from building. But barring a harmful use of property does not require any such direct reciprocity: the property owners in *Mugler*, *Hadacheck*, and *Schoene*

ject to examination to determine whether it does indeed substantially advance the goal of preventing a serious public harm, but if the prohibition passes that test, it rests squarely on the *Mugler* principle and, indeed, on a principle as old as the law of property.

### B. The Principle That a State May Bar Uses of Property That Threaten Serious Harm Remains Applicable Even if the Barred Uses Are the Only Economically Viable Uses of the Property

Petitioner contends that the *Mugler* principle ceases to apply where the barred use is the only valuable use of the property; where this is the case, he argues, the state must always pay compensation. (Br. 19-35.) But that contention, which is rejected by certain of his amici (*see* U.S. Br. 13-17; Brief of the Institute for Justice 20), is consistent neither with logic nor with precedent.

First, petitioner misses the point of the *Mugler* principle. While the principle has occasionally been referred to as a "nuisance exception" to the law of takings, it rests on the basic proposition that property rights do not encompass the right to harm others. No state's law defines "private property" to include a right to engage in activity that threatens harm to the public.[10] As this Court recognized in *Keystone*, "Since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone*, 480 U.S. at 491 n.20.[11] "'[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,'" *id.* at 491-92 (quoting *Mugler*, 123 U.S. at 665), and enforcement of that obligation does not trigger a right to compensation. *Id.*

Second, this Court's precedents are wholly inconsistent with the notion that there is a right to *some* economically viable use of property that trumps the government's right to bar harmful uses without compensation. In *Mugler* itself, the Court assumed as one possibility that the brewery buildings lacked any other use, and that "such establishments will become of *no* value as property." 123 U.S. at 664 (emphasis added). The Court did not suggest that the right to prohibit brewing activities without paying compensation turned on the availability of some residual valuable use. The majority in *Pennsylvania Coal* did not dispute Justice Brandeis's reading of the earlier cases as establishing that no such residual valuable use is necessary: "Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." 260 U.S. at 418 (citing, *e.g.*, *Mugler*, *Powell v. Pennsylvania*, 127 U.S. 678 (1888), and *Hadacheck*).[12] No decision of this Court

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enjoyed no advantage from the regulations at issue. *See Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting); *see also Keystone*, 480 U.S. at 491 & n.21.

[10] As noted by Chief Justice Rehnquist in his dissent in *Keystone*, "'Property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Id.* at 519 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) and *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

[11] Economists would refer to uses of property that impose harm on others as creating "externalities," costs that are not borne by the owner of the land. A regulation addressing such externalities by restricting a harmful use, where the harm is greater than the benefit otherwise reasonably expected to be realized from the proposed use of the property, merely corrects this situation by taking into account *all* of the costs associated with his use.

[12] The Court has also held that owners whose real property is wholly destroyed to prevent the spread of a fire, *see Bowditch v. Boston*, 101 U.S. 16, 18-19 (1879), or whose personal property is wholly destroyed to prevent the spread of disease, *see Sligh v. Kirkwood*, 237 U.S. 52, 59-60 (1915), are not entitled to compensation.

has suggested that an alternative economic use of property *must* be available when a harmful use of property is prohibited.[13]

There are obvious circumstances in which a legislature must be able to prevent harm by depriving an owner of all economically viable use without triggering any claim for compensation—circumstances in which the regulation, although it eliminates all economic use, would not bar anything the owner had a right to do. The Solicitor General suggests (U.S. Br. 14) a building safety code regulation, enforceable without compensation even against property on which it renders construction economically infeasible. Similarly, a regulation adopted in response to a newly discovered threat to safety (such as a geological fault or a flood threat created by a forest fire's destruction of neighboring trees) would be valid notwithstanding its impact on prior expectations. For example, if scientific advances allowed accurate prediction that a particular area of Washington State was likely to suffer a serious earthquake or volcanic eruption, surely the

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[13] In *Miller v. Schoene*, in the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted in passing that red cedar has "occasional use and value as lumber." 276 U.S. at 279. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially saleable, and nothing in the opinion remotely suggests that the state's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is perfectly clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the *burning* of cedar trees if that had been necessary to protect apple trees in which there was a public interest: the Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.* at 280. The Court's discussion of *Schoene* in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 126 (1978), mentions the owner's right "to use the felled trees" but does not suggest that *Schoene* turned on that point. *But cf. Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).



State could bar all new construction in this area. The discovery of a new offshoot of the San Andreas fault or of new rumblings within Mt. St. Helen's could create misfortune, but regulations reasonably responsive to such threats would not require compensation. The issue in the present case, to which we now turn, is whether the BMA, as applied to petitioner, substantially advances a legitimate state interest in preventing serious harm.

## II. THE SOUTH CAROLINA SUPREME COURT PROPERLY ACCEPTED THE FINDING OF THE SOUTH CAROLINA LEGISLATURE THAT BUILDING ADDITIONAL STRUCTURES ON COASTAL PROPERTY THREATENED SERIOUS HARM

The South Carolina legislature expressly found, in enacting the BMA, that the prohibited building activities would cause serious harm to others. The BMA declares that the beach/dune system "protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." S.C. Code Ann. § 48-39-250(1)(a) (Pet. App. 98). It further declares that unwise development "has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." *Id.* § 48-39-250(4) (Pet. App. 99). Explaining the means chosen to effectuate its purposes, the legislature stated in the BMA that the

> use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beach front property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beach front property to damage from wind and waves . . . .

*Id.* § 48-39-250(5) (Pet. App. 99). In sum, the legislature found that "Erosion is a natural process which be-

comes a significant problem for man only when structures are erected in close proximity to the beach/dune system." *Id.* § 48-39-250(6) (Pet. App. 99-100). It therefore acted "to arrest what it perceive[d] to be a significant threat to the common welfare." *Keystone*, 480 U.S. at 485.

Petitioner conceded in the South Carolina courts (as he does in this Court) "the public wisdom of the South Carolina Act" (Br. 10), and he declined to litigate any issue concerning the BMA's purposes or the appropriateness of the setback lines as applied to his property. To the contrary, he argues *only* that the *Mugler* principle either has not survived or cannot be applied to any case where a regulation, however valid, leaves no economically viable use of property. The South Carolina Supreme Court, accordingly, understood petitioner not to contest the state's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm" (Pet. App. 8) and "to prevent serious injury to the community." (*Id.* at 15.) It considered itself "bound by these uncontested legislative findings . . . . [in the absence of] any attack whatsoever on the statutory scheme . . . ." (*Id.* at 8-9.) The state court correctly rejected petitioner's contention that the *Mugler* principle could have no possible application to this case and then, quite logically given petitioner's position, treated *Mugler* as dispositive.

Absent any challenge from petitioner, it was entirely proper for the South Carolina Supreme Court to accept the legislature's findings at face value. If petitioner wished to argue (as some amici do in this Court) that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, or that the threat was not supported by sufficient findings, or that it is not clear whether the legislature was actually motivated by the threat of hurricane damage to coastal areas, the place to have made those arguments was in the South Carolina courts. When petitioner chose instead to rely solely on the argument that *Mugler* can-



not apply to him because he lost all economically viable use of his land, the state court was justified in assuming that the legislature was seeking in good faith "to arrest . . . a significant threat to the common welfare." *Keystone*, 480 U.S. at 485.

This Court should therefore affirm the South Carolina court's decision on the ground that the *Mugler* principle remains valid and is applicable even where all economically viable use of property is eliminated, and that the state court was entitled to accept the unchallenged findings of its legislature that make the *Mugler* principle applicable here.

But even if petitioner had challenged the legislature's findings, there was ample basis for the South Carolina court to determine that the BMA substantially advances a state interest in preventing serious harm. In scrutinizing a statute claimed to effect a taking, a court must of course "examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature." *Keystone*, 480 U.S. at 487 n.16. But the BMA easily withstands such scrutiny, for there was substantial basis for the South Carolina legislature's finding that construction of additional buildings seaward of a line drawn utilizing "the best available scientific and historical data," S.C. Code Ann. § 48-39-280(A) (Pet. App. 110), would threaten serious harm to people and property.

In the federal Coastal Zone Management Act, pursuant to which the state BMA was enacted, Congress itself recognized the threat of "loss of life and property caused by . . . the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands." 16 U.S.C. § 1452(2)(B) (1988). The threat of harm is certainly real: hurricanes, other storms, and ocean waves and flooding take large numbers of lives and cause extensive property damage,[14] and South Carolina knows this well. Hurricane Hugo, buffeting the South Carolina

[14] *See, e.g.*, W. Kaufman & O. Pilkey, *The Beaches Are Moving* 128-32 (1983).

coast, took 29 lives in that state and inflicted devastating damage on Charleston, one of America's most beautiful and historic cities.[15] Oceanfront development in storm areas poses a direct threat to property owners themselves, to storm rescue teams, and to landward property owners threatened by storm-created debris. Such development also leads to the loss of barrier beaches and barrier islands (like the Isle of Palms on which petitioner's property is situated) through erosion, loss of vegetation, and failure to accrete additional sand.[16] Barrier beaches up and down a coastline protect populated areas. Thus, while the wide beach and dune area buffer zone presently found on the Isle of Palms helped to protect some of its houses from destruction by Hurricane Hugo, other beaches subjected to long-term erosion were devastated by the storm.[17] The South Carolina legislature was thus fully justified in determining that landowners who build structures on barrier beaches are using their property in a way that threatens concrete and serious harm to the lives and property of others.[18]

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[15] *See* Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 213 (1991). As a result of Hurricane Hugo alone, the federal government has made payments of $1.024 billion in aid to South Carolina. *Id.* at 215.

[16] *See generally* I. McHarg, *Design With Nature* 7-13 (1969); *Managing Coastal Erosion: Report of the National Research Council* 23 (1990); W. Kaufman & O. Pilkey, *supra* note 14, at 109.

[17] *See Managing Coastal Erosion*, *supra* note 16, at 166.

[18] Several other states have adopted similar legislation. *See* Comment, *supra* note 15, at 216-18 & nn.46-48 (citing state statutes). The Florida legislature found when enacting its Beach and Shore Preservation Act that "imprudent construction . . . can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection of upland structures and endanger adjacent properties." Fla. Stat. Ann. § 161.053(1) (West 1984).

The South Carolina legislature also referred to the threat of environmental damage. Certain amici assert that this is not a serious public harm within the *Mugler* principle. But Congress has certainly concluded otherwise. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (1988); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988).



Finally, petitioner has never suggested, nor could he, that it is inappropriate to apply the BMA to his specific property. To the contrary, petitioner must acknowledge that his property has been under water during the last forty years. (*See* J.A. 9.) The SCCC's drawing of the setback line to include his property was entirely reasonable. To be sure, landowners who had developed their beachfront property prior to imposition of the setback line were less severely affected by implementation of the BMA,[19] but the legislature's evolving understanding (reflected in the statutory findings) that traditional erosion control devices are counterproductive permitted it to bar new building without requiring demolition of existing structures.[20]

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[19] Such landowners are subject to restrictions on rebuilding any structures that are destroyed in the future. S.C. Code Ann. § 48-39-290(B)(1) (Pet. App. 117-19).

[20] The SCCC might also have been able to show that petitioner, an experienced developer, took a deliberate gamble—that in 1986 he could have anticipated the possibility of further restrictions to protect a sensitive area but chose to take that risk. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

Indeed, if after petitioner's purchase the beach had eroded (as, historically, it had) so that petitioner's property was on the wrong side of the first line of dunes, then the prior statute, based on the previous public understanding of the nature of the erosion risk, would itself have prohibited all construction—yet the loss of that "right to build" would not have been compensable. As it happened, what shifted was not the beach but the public understanding of the nature and severity of the risk of erosion. Petitioner lost his gamble because of the nature of his property, as that nature came to be known, not because of a capricious decision on the part of any legislature.

## III. AN OTHERWISE PROPER REGULATION, NOT INVOLVING A PERMANENT PHYSICAL OCCUPATION, CANNOT EFFECT A TAKING UNLESS IT DENIES ALL ECONOMICALLY VIABLE USE OF PROPERTY

Various amici suggest that *any* restriction on the use of property, unless justified by the need to prevent serious harm to others, effects a taking, even if the restriction does not eliminate all economically viable use of the property. According to one, "The proper rule is thus one of strict proportion: the greater the taking, the greater the restriction, then the greater the compensation that must be paid." Brief of Institute for Justice as Amicus Curiae 13; *see also* Brief of Amicus Curiae The Nemours Foundation, Inc. 11-12. These suggestions are not pertinent to this case, which involves a restriction that is intended to prevent serious harm and apparently denies all economic use of petitioner's parcels. But the suggestion is also seriously wrong.

As Justice Holmes said in the case that is the fountainhead of this Court's regulatory takings jurisprudence, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Over and over since then, the Court has recognized that governments may adopt measures that substantially adjust the burdens and benefits of economic life and reduce the value of property without effecting a compensable taking. In *Hodel v. Irving*, 481 U.S. 704, 713 (1987), for example, the Court noted that "the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners." In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), the Court affirmed that "government may execute laws or programs that adversely affect recognized economic values." And the Court has repeatedly stated that a regulation reducing the value of property "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).



Indeed, the Court has never found a regulatory "taking" based on the quantum of value the owner has lost unless the owner has been deprived of all economic use of a properly defined parcel of property.[21] For example, in *Pennsylvania Coal*, the Court found that the regulation went "too far" because, inter alia, it eliminated all value of the coal in question: "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does." 260 U.S. at 414-15. In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court found a taking where the government completely destroyed materialmen's liens against ships. Although it relied on other considerations as well, the Court clearly stated: "Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none." *Id.* at 48. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court found that a regulation authorizing EPA to disclose data submitted confidentially by plaintiffs effected a taking, because it would utterly destroy the "economic value" of the data. *Id.* at 1011-12.

By contrast, this Court has *never* found a regulatory taking where economically viable uses of property remain. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), the Court upheld a law imposing a 75 percent diminution in value. In *Andrus v. Allard*, 444 U.S.

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[21] Petitioner concedes (Br. 10) that the present case does not involve a permanent physical occupation.

51, 66-68 (1979), the Court upheld against a taking challenge a statute limiting the sale of eagle feathers, though the feather owners' ability to derive economic benefit was drastically reduced by the statute. *See also Penn Central*, 438 U.S. at 104 (regulation denying right to exploit valuable air rights did not effect taking).

Virtually every regulation of economic life has the effect of denying some property a portion of its value. Since 1922, the Court has recognized that the question whether a regulation affecting the use of private property "goes too far" and effects a taking "cannot be disposed of by general propositions." *Pennsylvania Coal*, 260 U.S. at 415, 416. The answer is given not by any bright-line test but by a combination of factors: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." *Penn Central*, 438 U.S. at 124. The result of applying these factors in a given case may well be to reduce a property's value without compensation to the owner. But such an owner shares in the advantage derived by everyone from the capacity of our elected legislatures to regulate the uses of property even when regulation reduces value; it is "the advantage of living and doing business in a civilized community." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1007.



## CONCLUSION

The decision of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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